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In The

# Supreme Court of the United States

UNUM LIFE INSURANCE COMPANY OF AMERICA AND UNUMPROVIDENT CORPORATION,

*Petitioners,*

v.

JANCYE H. TIERNEY,

*Respondent.*

**On Petition For Writ Of Certiorari To The Court Of Appeals For The Eighth District Of Texas**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether multiple owners of a corporate employer are considered employees for purposes of determining whether a benefit plan sponsored by the corporation is governed by the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. §1001, *et seq.* ("ERISA") where the plan covers one or more of the joint owners but no non-owner employees.

## CORPORATE DISCLOSURE STATEMENT

UNUMProvident Corporation is a publicly traded company. UNUMProvident Corporation owns 10% or more of the stock of UNUM Life Insurance Company of America. UNUM Holding Company also owns 10% or more of the stock of UNUM Life Insurance Company of America. UNUM Holding Company is not publicly traded. UNUMProvident Corporation and UNUM Life Insurance Company of America are hereinafter collectively referred to as "Unum."

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## PETITION FOR WRIT OF CERTIORARI

This case presents an issue closely related to the issue in *Raymond B. Yates, M.D., P.C. Profit Sharing Plan v. Hendon*, ___ U.S. ___, ___ S.Ct. ___, ___ L.Ed.2d ___, 2004 U.S. Lexis 1836 (March 2, 2004), *i.e.* the employee status of working owners of corporate plan sponsors under ERISA. In *Yates*, this Court held that a sole shareholder is an employee/participant under ERISA where the sole shareholder participates in a plan that also covers at least one non-owner employee even though the sole shareholder might also be considered an employer under the statute. *Yates* was based in part on statutory provisions that reflect congressional intent that working owners be permitted to participate in ERISA-governed benefit plans and in part on Department of Labor regulatory and interpretive guidance that confirm this intent.

The statutory provisions relied on in *Yates* likewise reflect congressional intent that *joint* shareholders be permitted to participate in ERISA plans. *See, e.g., Yates,* 2004 U.S. Lexis 1836, *27 ("In sum, Title I's provisions involving loans to plan participants, by explicit inclusion or exclusion, assume that working owners – shareholder-employees, partners, and sole proprietors – may participate in ERISA-qualified benefit plans."). Moreover, the same Labor Department regulation referenced in *Yates* and accompanying agency advisory opinions dictate that where a corporate plan sponsor is owned by *multiple* working owners (as opposed to a sole owner and his/her spouse), the working owners who participate in the plan are considered employees, bringing the benefit plan within ERISA, regardless of whether any non-owner employees are also covered by the plan. The regulatory distinction between sole shareholders (who are employees under

ERISA only where at least one non-owner employee also participates in the benefit plan) and joint shareholders (who are employees under ERISA regardless of whether any non-owner employees participate in the benefit plan) recognizes that while sole shareholders have little or no need for ERISA's protections absent participation by non-owner employees, the same is not necessarily true with joint shareholders, particularly where ownership is diluted and a shareholder may have no more control over the corporation or a corporation-sponsored benefit plan than non-owner employees.

Ignoring statutory and Labor Department guidance that this Court found so helpful in *Yates* and deciding this case without the benefit of *Yates*, the Court of Appeals of Texas held that the respondent, who was one of several working owners of the corporate employer, was an employer and not an employee under ERISA. The state court then held that to the extent the corporation's disability plan only covered respondent and other joint shareholders, it would not be governed by ERISA. *Yates*, in combination with express Labor Department guidance on the issue, dictates that the respondent was an employee under ERISA and that the disability plan under which she now seeks benefits is governed by ERISA. As the case presently stands, not only is the state court decision contrary to the reasoning in *Yates*, but it also furthers a split among the federal circuit courts and between the federal circuit courts and the highest courts of several states on this very issue. The potential for this split to broaden continues as cases involving the same issue are currently pending in the Ninth and Fifth Circuits.

Petitioners respectfully pray that a writ of certiorari issue to review the decision of the Court of Appeals for the

Eighth District of Texas to resolve the conflict between the lower court decision and this Court's decision in *Yates* and to resolve the split in the lower courts. Alternatively, petitioners respectfully pray that the Court grant the writ, overturn the judgment below and remand this matter to the Court of Appeals for the Eighth District of Texas for reconsideration in light of *Yates*. Not only would the latter approach allow the lower court to benefit from the guidance of *Yates* and Labor Department interpretation that this Court relied on in *Yates*, it would also allow time for other lower courts (including the Ninth and Fifth Circuits) to decide this issue in the wake of *Yates* with the potential that *Yates* will assist the lower courts in repairing the current split in authority.

## OPINIONS AND ORDERS BELOW

The opinion of the Court of Appeals for the Eighth District of Texas, filed on January 30, 2003, is reported at 97 S.W.3d 842, and is reproduced at Appendix ("App.") 1-10. The Supreme Court of Texas denied review on December 12, 2003, which decision is unreported and is reproduced at App. 21. The decisions of the trial court are reproduced at App. 11-20.

## JURISDICTION

Respondent filed this action in the District Court of Dallas County, Texas, Fourteenth Judicial District as a suit for damages arising from a decision by Unum to deny respondent's claim for long term disability benefits under a group disability policy issued by Unum to respondent's

employer.[1] On February 4, 2002, the trial court granted partial summary judgment to Unum on the ground that the disability policy was part of an ERISA-regulated employee benefit plan and ruled that respondent's state law claims were preempted. On April 18, 2002, the trial court granted summary judgment to Unum on the ground that Unum's decision to deny respondent's claim for benefits was not arbitrary and capricious under *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989). Respondent appealed to the Texas Court of Appeals. On January 30, 2003, the Court of Appeals reversed the trial court summary judgment, holding that to the extent the disability policy constituted two benefit plans providing separate coverage to respondent and other joint owners of the corporation, it would not be governed by ERISA. The Court of Appeals remanded the matter to the trial court for resolution of what the Court of Appeals considered to be a disputed issue as to whether there was a separate plan covering the respondent and other owners. Unum sought discretionary review by the Supreme Court of Texas. On December 12, 2003, the Supreme Court of Texas denied Unum's petition for review. This Petition is being filed within the ninety-day period following entry of that order pursuant to Sup.Ct.R. 13.1 and 13.3. This Court has jurisdiction to review the state court judgment under 28 U.S.C. §1257(a) because the decision on review involves a title, right, privilege, or immunity claimed under the

[1] The state trial and appellate courts had jurisdiction of this matter. ERISA specifically grants concurrent jurisdiction to state and federal courts to adjudicate disputes over a participant's entitlement to benefits under an ERISA-governed benefit plan. ERISA, section 502(e)(1) [29 U.S.C. §1132(e)(1)].

statutes of the United States. Specifically, this case involves the construction and application of ERISA.

## STATUTES INVOLVED

This case involves sections 3(1), 3(3), 3(6), 502(a), and 514(a) of ERISA, 29 U.S.C. §§1002(1), 1002(3), 1002(6), 1132(a), and 1144(a). The text of these statutes is set out in App. 22-24.

## STATEMENT OF THE CASE

It is of paramount importance to employers, plan administrators, claim administrators, fiduciaries, participants, and beneficiaries to have a clear rule to determine when an employee benefit plan is governed by ERISA. The issue in this case is whether multiple working owners of a corporate employer are considered employees under ERISA for purposes of determining whether a plan that covers the working owners is governed by ERISA. The answer to this question lies in the same Department of Labor regulation, 29 C.F.R. §2510.3-3 (2003), that this Court relied on in *Yates* to hold that a sole shareholder is an employee under ERISA. The only difference between this case and *Yates* is that in *Yates* the Labor Department regulation required that because the employer was owned by a sole shareholder, at least one non-owner employee needed to be covered by the plan in order for the plan to be governed by ERISA. In this case, the same Labor Department regulation and agency interpretation of the regulation provide that because the corporate plan sponsor is owned by two or more shareholders who are not spouses of one another, the

joint shareholders are considered employees under ERISA for purposes of determining whether the plan is governed by ERISA, regardless of whether any non-owner employees participate in the plan.

Respondent was one of several shareholders of Special Insurance Services, Inc. ("Corporation"). The Corporation sponsored an employee disability program, the benefits of which were funded by a group policy of long term disability insurance issued to the Corporation by Petitioner UNUM Life Insurance Company of America. Respondent was covered under the policy, as were other shareholder/employees and certain non-owner employees. In August 1998, respondent filed a claim for disability benefits. After benefits were paid for a time, Unum determined that respondent did not qualify for further benefits.

Respondent sued Unum, alleging breach of contract and other claims. After unsuccessfully attempting to remove the case to federal court, Unum filed a motion for summary judgment in the state trial court. The trial court granted Unum's motion in part, ruling that respondent's disability coverage was part of an ERISA-governed employee benefit plan and that respondent's state law claims were preempted by ERISA. App. 14-19. The trial court rejected respondent's argument that her coverage was part of a plan that was separate from the coverage provided to non-owner employees of the Corporation. App. 16-17. Although the trial court initially denied Unum's motion for summary judgment on the reasonableness of its decision to terminate respondent's benefits, the court eventually granted a second motion for summary judgment filed by Unum, ruling that Unum's decision was not arbitrary and capricious and must be upheld as a matter of law. App. 12-13.

Respondent appealed. On January 30, 2003, the Court of Appeals overturned the summary judgment and remanded the matter to the trial court for further proceedings. App. 1-9. The Court of Appeals held that if there was a separate plan covering only respondent and other joint shareholder/employees of the Corporation, such a plan would not be regulated by ERISA:

> In both the trial court and this Court, Tierney argued that SIS's disability insurance consisted of two separate plans – one for employees and one for owners – and therefore her coverage under the owner plan did not fall under ERISA. The Fifth Circuit has held that a plan in which the only participants are non-employees, such as owners or partners, does not constitute an ERISA benefit plan . . . In contrast, where a plan covers both employees and owners the plan is subject to ERISA and its complete preemption doctrine . . . We must thus determine whether a fact question exists as to whether UNUM's policy created two truly independent plans.

App. 6-7. The Court of Appeals then held that there was a disputed issue of material fact as to whether there was a separate plan covering only the joint shareholders and remanded the matter to the trial court to resolve this issue. App. 8. Unum petitioned the Supreme Court of Texas for discretionary review of the ERISA issue. Unum's petition was denied on December 12, 2003. App. 21.

## REASONS FOR GRANTING THE WRIT

The Court of Appeals should have held that the disability plan would be governed by ERISA, even if there was a separate plan covering only the joint shareholders. This holding would have negated any need for further factual development of whether or not there was a separate plan. Respondent opposed Unum's petition for review in the Texas Supreme Court, arguing that the court had no jurisdiction to review the appellate court's holding on federal law and that this issue was not significant to Texas jurisprudence. Respondent suggested that this issue should be reviewed only by this Court.

The Court of Appeals decision on the inapplicability of ERISA to plans covering joint owners is wholly at odds with the reasoning of this Court in *Yates* and with Labor Department regulatory and interpretive authority that the Court found influential in *Yates*. Moreover, although the state court decision is consistent with decisions by the Ninth Circuit (reaffirmed as recently as February 2004) and the Massachusetts Supreme Judicial Court, it is directly in conflict with decisions by the Third, Sixth, and Tenth Circuits. Resolution of these conflicts is necessary to restore the uniform regulation of employee benefit plans that Congress intended by enacting ERISA.[2]

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[2] The authority cited by the Texas Court of Appeals for the holding that joint shareholder/employees are not considered employees under ERISA and that a plan covering joint shareholder/employees is not governed by ERISA does not support that holding. *Meredith v. Time Ins. Co.*, 980 F.2d 352 (5th Cir. 1993) held that ERISA did not apply to a health plan where the plan sponsor was a sole proprietorship and the only participants were the owner and her spouse. *Id.* at 357-58. *McNeil*

(Continued on following page)

## I. THE COURT SHOULD GRANT REVIEW BECAUSE THE STATE COURT DECISION CONFLICTS WITH THIS COURT'S DECISION IN *YATES*.

In *Yates*, this Court held that a sole shareholder is a participant under ERISA where the sole owner participates in a benefit plan that also covers one or more non-owner employees. The Court expressly endorsed the Labor Department's position as stated in certain advisory opinions interpreting the Department's regulation at 29 C.F.R. §2510.3-3. This Court has previously stated that formally enacted agency regulations are entitled to deference. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). In *Yates*, the Court held that an agency's advisory opinions "reflect[] a 'body of experience and informed judgment to which courts and litigants may properly resort for guidance,'" 2004 U.S. Lexis 1836, *32, and that such interpretations "merit[] the Judiciary's respectful consideration," *Id.* at *37.

The Labor Department regulation in *Yates* "addresses . . . what plans qualify as 'employee benefit plans' under Title I of ERISA." 2004 U.S. Lexis 1836, *37. The regulation

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*v. Time Ins. Co.*, 205 F.3d 179 (5th Cir. 2000), *cert. denied*, 531 U.S. 1191 (2001) held that a health plan covering one partner and one non-owner employee was governed by ERISA and noted that a plan covering only the partner would not be governed by ERISA. *Id.* at 190, n. 17. *Parker v. Parker*, 897 S.W.2d 918 (Tex. App. 1995) held that a benefit plan that covered a sole owner and his spouse was not governed by ERISA. All of these decisions are consistent with the Labor Department regulation and interpretive authority. Unlike this case, none of the cases cited by the Texas Court of Appeals involved plans covering one or more joint shareholders of a corporate employer.

excludes from ERISA those plans that do not cover *any* employees:

> For purposes of Title I of the Act and this chapter, the term 'employee benefit plan' shall not include any plan, fund, or program . . . under which *no employees* are participants covered under the plan . . . For example, a so-called 'Keogh' or 'H.R. 10' plan under which *only partners or only a sole proprietor* are participants covered under the plan will not be covered under Title I. However, a Keogh plan under which one or more common law employees in addition to the self-employed individuals are participants covered under the plan, will be covered under Title I.

29 C.F.R. §2510.3-3(b) (emphasis added). The regulation then states that, for purposes of determining whether a corporation-sponsored plan covers at least one employee (and is therefore governed by ERISA), one cannot consider the owner of the corporation an "employee" where coverage is limited to the owner and *where the corporation is wholly owned by the covered owner or by the owner and his spouse*:

> For purposes of this section:
>
> (1) An individual and his or her spouse shall not be deemed to be employees with respect to a trade or business, whether incorporated or unincorporated, *which is wholly owned by the individual or by the individual and his or her spouse*. . . .

*Id.* at §2510.3-3(c) (emphasis added). For purposes of determining whether a plan covers at least one employee and is therefore governed by ERISA, the regulation excludes *only* sole owners or the equivalent of sole owners

(i.e. where a company is owned by an individual and his/her spouse).

Nothing in the Labor Department regulation excludes from employee status *joint* owner/employees of a corporation who are not married. Shortly after the Department issued the regulation, it issued an advisory opinion stating that, where a corporation is owned by multiple shareholders who are not married, a plan sponsored by the corporation is governed by ERISA even though the shareholder/employees are the only persons covered by the plan. The specific question posed to the Department was whether a plan would be exempt from Title I of ERISA "if the only participants . . . are shareholders or spouses of shareholders." Department of Labor Advisory Opinion 76-67, 1976 ERISA Lexis 58 (May 21, 1976). The Department responded that the plan would be exempt from ERISA *only* where the stock of the corporate employer was wholly owned by one shareholder and his/her spouse and the shareholder and his/her spouse were the sole participants in the plan. The Labor Department stated as follows:

> For purposes of Title I of ERISA, the term 'employee benefit plan' does not include any plan, fund, or program . . . under which no employee participants are covered under the plan (section 2510.3-3(b) of the enclosed regulation). According to section 2510.3-3(c)(1), an individual and his or her spouse are not employees with respect to an incorporated business if the business is wholly owned by the individual or by the individual and his or her spouse. *Thus, your interpretation is correct only where the stock of the corporation is wholly owned by one shareholder and his or her spouse and the shareholder or the shareholder*

> *and his or her spouse are the only participants in the plan.*

*Id.* (emphasis added). The fact that the regulation exempts only plans limited to *sole* shareholders is confirmed by other Labor Department commentary stating that the Department's concern in enacting the regulation was to exclude plans that were limited to a sole owner and his family. *See, e.g.*, DOL Advisory Opinion 95-06A, 1995 ERISA Lexis 31 (May 18, 1995) (regulation excluding plans that do not cover employees only applies where the plan is sponsored by a corporation that is wholly owned by one individual); DOL Advisory Opinion 92-21A, 1992 ERISA Lexis 22 (October 19, 1992) (same); DOL Advisory Opinion (Unnumbered), 1985 ERISA Lexis 57 (January 18, 1995) ("regulation section 2510.3-3(c) excludes *certain* owner-employees from the term 'employee' in regulation section 2510.3-3") (emphasis added); DOL Advisory Opinion 81-88A, 1981 ERISA Lexis 31 (July 9, 1981) ("The provisions of 29 C.F.R. §2510.3-3(c)(1) apply, in the case of a corporation, only where a trade or business is wholly owned by an individual or by an individual and his spouse").

The working owner in *Yates* was a sole shareholder. Under the express terms of the Labor Department regulation, the sole shareholder was not considered an "employee" for purposes of determining whether the pension plan in that case was governed by ERISA. However, because the plan also included certain non-owner employees, the pension plan was governed by ERISA. Once the plan was governed by ERISA, this Court held that all persons participating in the plan, including the sole shareholder, were considered participants under ERISA. 2004 U.S. Lexis 1836, *41.

The facts in this case are slightly different than in *Yates,* but are no less subject to the express terms of the Labor Department regulation and agency interpretations of the regulation. In the present case, the Corporation was not wholly owned by one person nor was it wholly owned by two persons who were spouses. Under the Labor Department regulation, the joint owners of the Corporation were not excluded from consideration as "employees" for purposes of determining whether the plan was governed by ERISA. Any benefits provided to the respondent and other joint shareholder/employees are therefore not excluded from ERISA, even if the plan covering the working owners was separate from any plan covering non-owner employees.

Although Unum cited the Labor Department regulation in its briefs, the Court of Appeals ignored the regulation. More to the point, it did so without the benefit of this Court's decision in *Yates.* This Court's decision in *Yates* clarifies the importance of the Labor Department's interpretations and applications of ERISA provisions, including the Labor Department's pronouncements on the specific issue in this case. The Texas Court of Appeals failed to give credence (or even acknowledge) the Department's position. In *Yates,* the Sixth Circuit's failure to take into account the Department's interpretive guidance resulted in reversal of the Sixth Circuit's holding in that case. The same result should apply to the Texas Court of Appeals decision in this case. Petitioner therefore requests that this Court grant review, vacate the judgment below, and remand this matter to the Texas Court of Appeals for reconsideration in light of *Yates.*

## II. THE COURT SHOULD GRANT REVIEW TO RESOLVE A DIRECT SPLIT IN THE CIRCUITS AND BETWEEN THE FEDERAL CIRCUIT COURTS AND STATE COURTS OF LAST RESORT ON THE QUESTION PRESENTED.

The Court of Appeals of Texas is not the only court to ignore or misconstrue the Labor Department's position on what types of working owners are considered "employees" for purposes of determining whether a benefit plan is governed by ERISA. The Ninth Circuit and the Massachusetts Supreme Judicial Court have ruled that joint owners are not considered employees under ERISA in *Kennedy v. Allied Mut. Ins. Co.*, 952 F.2d 262 (9th Cir. 1991) and *Ritter v. Massachusetts Cas. Ins. Co.*, 439 Mass. 214, 786 N.E.2d 817 (2003). Respondent expressly relied on *Kennedy* and *Ritter* in her briefs filed in the state courts. The Ninth Circuit recently reaffirmed its position in *Bess v. New York Life Ins. Co.*, 2004 U.S. App. Lexis (9th Cir. February 10, 2004) (unpublished). *Bess* is currently pending on a petition for rehearing *en banc*. The Third, Sixth, and Tenth Circuits have rendered decisions that are directly contrary to the holding of the Court of Appeals of Texas, *Kennedy,* and *Ritter*. *See Leckey v. Stefano*, 263 F.3d 267 (3d Cir. 2001); *Santino v. Provident Life and Acc. Ins. Co.*, 276 F.3d 772 (6th Cir. 2001); *Sipma v. Massachusetts Cas. Ins. Co.*, 256 F.3d 1006 (10th Cir. 2001). Further emphasizing the importance of the issue, argument was heard on March 4, 2004 in a Fifth Circuit case also involving the issue of ERISA governance of plans covering multiple owners of a corporate employer. *Provident Life and Acc. Ins. Co. v. Sharpless*, No. 03-30566 (5th Cir.).

Like the Texas Court of Appeals in this case, the Ninth Circuit in *Kennedy*, *supra*, held that where a corporate

employer was owned by two shareholders who were the only participants in a pension plan, the owners were not considered employees under ERISA and the plan was not governed by ERISA. 952 F.2d at 265. In support of this holding, the Ninth Circuit relied on a misreading of the Labor Department regulation, much like the Sixth Circuit relied on a misreading of the same regulation in *Yates*. *Id.* Based on this misreading, the Ninth Circuit held that "the Plan was not in compliance with ERISA and that the bond issued by Allied is not subject to interpretation under Title I of ERISA." *Id.*

Similarly, the Massachusetts Supreme Judicial Court recently held in *Ritter*, *supra*, that where a disability benefit plan was sponsored by a corporation owned by two shareholders who were not spouses, a claim for benefits filed by one of the working owners was not governed by ERISA. 439 Mass. at 222, 786 N.E.2d at 824. The Massachusetts Supreme Judicial Court did not even mention the Labor Department regulation, but did acknowledge that there is disagreement among the federal circuit courts on the issue. 439 Mass. at 218, 786 N.E.2d at 822.[3]

In contrast to these decisions, the Third Circuit in *Leckey v. Stafano, supra,* held that where a corporate plan sponsor was owned by two shareholders who were not

[3] The reasoning in *Ritter*, like the reasoning of the Texas Court of Appeals in this case, was that a joint owner cannot be both an employer and an employee under ERISA. *Yates* expressly rejected any blanket prohibition of dual status: "Under ERISA, a working owner may have dual status, *i.e.*, he can be an employee entitled to participate in a plan and, at the same time, the employer (or owner or member of the employer) who established the plan." 2004 U.S. Lexis 1836, *29-30.

spouses, the owners, who were the sole participants in the plan, were considered "employees" under ERISA and that the pension plan itself was therefore governed by ERISA. 263 F.3d at 271. The Third Circuit expressly relied on the Labor Department regulation. The Court held that the regulation excluded from ERISA plans that did not cover employees. Relying on the "plain language" of the regulation the Third Circuit held that it was "left to apply the regulation as written." *Id.* The Court held that "[t]he regulation only prevents spouses who wholly own a business from being counted as employees." *Id.* Relying on the Labor Department's 1976 advisory opinion (discussed above), the Third Circuit held that joint shareholders of a corporate employer *are* counted as employees for purposes of determining if a benefit plan is regulated by ERISA, even though the employees are also owners of the corporation that sponsors the plan. *Id.*

Likewise, in *Sipma v. Mass. Casualty, supra,* a minority shareholder of a corporate employer was covered under an employee disability plan. No non-owner employees were covered. Referring to the Labor Department regulation's exception from employee status applicable to sole owners, the Court held that: "the exception on its face is limited to individuals (including spouses) who are sole owners of a business. The exception does not extend to exclude multiple shareholders from the definition of 'employee.'" 256 F.3d at 1011. The Court also held that its reading of the regulation was bolstered by the 1976 advisory opinion, making it clear that the Tenth Circuit's reading of the regulation was the same as the Labor Department's reading of the regulation. *Id.* The Tenth Circuit concluded that "[s]ince Mr. Sipma was not the sole shareholder of the corporation, he is not excluded from the

definition of 'employee' for purposes of determining whether an 'employee benefit plan' exists." *Id.* at 1012. The Tenth Circuit noted that its holding conflicted with the Ninth Circuit decision in *Kennedy*, *supra*. *Id.* at 1011.

Finally, in *Santino v. Provident*, *supra*, the plaintiff was one of three shareholders of a medical corporation and was insured under two disability policies that were paid for by the corporation. Santino argued that his policies were not governed by ERISA because he was a joint shareholder and the only person covered under the disability program. The Sixth Circuit disagreed and ruled that the policies were governed by ERISA:

> Section 2510.3-3(c)(1) . . . does not exclude joint shareholders from the ERISA definition of 'employee.' On its face, the regulation applies only to 'an individual' who 'wholly owns' a business. Moreover, the Department of Labor interprets section 2510.3-3(c)(1) as applying *'only* where the stock of the corporation is wholly owned by one shareholder.' Op. Dep't of Labor 76-67 (May 21, 1976) (emphasis added).
>
> . . .
>
> Because Santino is an ERISA 'employee' and the policies provide him with benefits in the event of disability, we find that the policies constitute an ERISA 'employee welfare benefit plan.'

276 F.3d at 775.

Resolution of the current split regarding the employee status of joint working owners under ERISA is no less important than resolution of the issue affecting the sole shareholder in *Yates*. Only a "bright line" definition can give employers, administrators, and other plan entities the

necessary guidance to determine whether a benefit plan is or is not governed by ERISA. These entities cannot afford to wait for litigation or rely on unclear standards because court decisions and clarification of standards in given cases may come too late for these entities to ensure that a given plan is properly administered under the statute. To avoid these uncertainties and to provide ERISA entities with clear guidance on what types of plans are governed by ERISA, the Department of Labor has established a "bright line": (1) where the employer is wholly owned by an individual or by an individual and his or her spouse or where the employer is a partnership, the sole owner or partner are not considered employees for purposes of determining whether the plan is governed by ERISA; (2) where the employer is a corporation owned by multiple shareholders, the multiple shareholders *are* considered employees for purposes of determining whether the plan is governed by ERISA.

The regulatory distinction between sole shareholders and joint shareholders is reasonable. Where a sole shareholder is the only participant in the plan, there is no need for the protections afforded by ERISA because the owner has full control over the plan. Where joint shareholders participate in a plan, the owners do not have the same level of control as a sole shareholder. In fact, in situations where there are a number of shareholders, ownership is diluted and the owners may have virtually no control over the corporation itself or over the benefit plan sponsored by the corporation.

This is not to say that employee status under ERISA should depend on the amount of stock owned by a joint shareholder or on his or her percentage of ownership. Such a rule would create confusion in the administration of

employee benefit plans because administrators would have to determine with respect to each and every plan sponsored by a corporation how much stock is too much for an individual to be considered an employee. Such a rule would also result in the potential for benefit plans to float in and out of ERISA regulation as stock is bought and sold and as ownership percentages change over time.[4]

The question of the status of joint working owners as employees under ERISA is not an isolated issue applicable to only a limited group of employee benefit plans. Rather, the issue affects all types of benefit plans, welfare and pension, insured and uninsured. *Yates* holds that working owners should not be excluded from employee/participant status under ERISA merely because they are owners. The state court's contrary holding in this case could exempt thousands of employees who own stock in their employer from employee status under ERISA. Mere ownership of an employer's stock should not exempt individuals from employee/participant status nor should it remove benefit plans that cover these owners from ERISA.

Finally, exclusion of plans that cover joint owners can also create inconsistency of application within the same plan documents. This case provides a prime example. While the Court of Appeals decision leaves open the

[4] The Labor Department also recognized and confirmed the distinction between partner-only plans, which are exempt from ERISA, and joint shareholder plans, which are governed by ERISA. In explanatory comments, the Department noted that corporate shareholders are included in ERISA, unlike partners, because of the universal distinction between the employee status of working shareholders in corporations and the non-employee status of owners in partnerships. *See* 40 Fed. Reg. 34528 (1975).

possibility that the owners and non-owners might be covered under separate "plans," the record indicates that they are covered under the same policy (and in several situations, the same policy terms). As a result of the Court of Appeals holding, there is the possibility that the respondent's coverage would be governed by state law whereas the coverage applicable to non-owner employees under the same policy would be governed by ERISA. Such a result should be foreclosed by *Yates*: "Excepting working owners from the federal Act's coverage would generate administrative difficulties and is hardly consistent with a national uniformity goal." 2004 U.S. Lexis 1836, *31.

## CONCLUSION

For the reasons stated herein, Petitioners respectfully request that this Court grant review and reverse the ruling below.

Respectfully Submitted,

DOUG K. BUTLER

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March 10, 2004

[SEAL]

COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

| | | |
|---|---|---|
| JANCYE H. TIERNEY,<br>Appellant,<br>v.<br>UNUM LIFE INSURANCE COMPANY OF AMERICA and UNUM PROVIDENT CORPORATION,<br>Appellee. | §<br>§<br>§<br>§<br>§ | No. 08-02-00269-CV<br>Appeal from the<br>14th District Court<br>of Dallas County, Texas<br>(TC# 00-04604) |

## OPINION

This case involves ERISA[1] preemption of common law claims against a long-term disability insurer. Finding that the trial court erred in ruling that no fact question exists on whether ERISA preempted Tierney's state law claims, we reverse and remand for further proceedings.

### Facts

Tierney brought suit against UNUM Life Insurance Company of America and UNUM Provident Corporation ("UNUM") for termination of her disability benefits under a long-term disability plan ("the Plan") purchased by Special Insurance Services, Inc. ("SIS"). Tierney was an

[1] Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001-1461 (1999 & Supp. 2002).

SIS corporate officer and held an ownership interest in the corporation.

In August 1998, Tierney notified UNUM that she was making a claim for long-term benefits after being diagnosed with a digestive disorder, antral duodenal dysmotility. UNUM accepted the claim and began paying plan benefits to Tierney. Fourteen months later, UNUM terminated payments to Tierney. UNUM's reasons for denying Tierney further benefits was its conclusion that her symptoms did not indicate a level of impairment sufficient to preclude her from working and that her disability was based on self-reported symptoms that limited her policy coverage to twelve months. Tierney unsuccessfully challenged UNUM's decision via its administrative process.

Tierney then filed suit against UNUM and the agent who sold SIS the policy, alleging causes of action under the Texas Insurance Code, the Texas Deceptive Trade Practices Act, for breach of contract, and for negligence ("the state law claims"). UNUM sought removal to federal court urging that ERISA completely preempted Tierney's state law claims.

The U.S. District Court remanded the case. In a comprehensive memorandum order, Judge Joe Fish held that UNUM's disability policy was not an employee benefit plan within the meaning of ERISA and that UNUM had thus failed to sustain its burden of proving complete preemption of Tierney's state law claims. Following remand, discovery proceeded in state court. In May 2001, UNUM again attempted to remove the case to federal court and reasserted its ground for removal as complete ERISA preemption of Tierney's state law claims. Tierney filed a motion for remand, which again was granted by

Judge Fish. Judge Fish rejected UNUM's second attempt at removal based on its contention that discovery had revealed new information to support UNUM's ERISA preemption argument.

Following the second remand, UNUM filed a motion for summary judgment in October 2001 making two-tiered argument for entry of judgment in its favor. First, UNUM urged that Tierney's state law claims were completely preempted by ERISA. Second, it claimed that UNUM's decision to deny Tierney's benefit was not an abuse of discretion under ERISA. The trial court agreed that ERISA preemption applied, but denied UNUM judgment on its abuse of discretion ground.

UNUM (having apparently remarshalled its evidence) filed a second motion for summary judgment on the abuse of discretion issue. In the motion it asserted that no abuse was demonstrated because Tierney was not disabled within the meaning of the Plan's provisions, and because Tierney's symptoms were self-reported and therefore subject to the Plan's twelve-month limitation on benefits.

Tierney responded by arguing that the finding of abuse of discretion was a question for the jury. Tierney also filed a cross-motion for summary judgment requesting the trial court find that UNUM had abused its discretion by denying her benefits such that judgment in her favor was appropriate. The trial court granted UNUM's motion for summary judgment and denied Tierney's. This appeal follows.

## Standard of Review

We review the trial court's determination that ERISA preempted Tierney's state law claims pursuant to the traditional summary judgment standard of review. We must thus determine whether the movant has sustained its burden to show that it is entitled to judgment as a matter of law or whether material fact issues preclude summary judgment. We view all evidence favorable to the non-movant as true. TEX. R. CIV. P. 166a; *Nixon v. Mr. Property Management Co., Inc.,* 690 S.W.2d 546, 548-49 (Tex. 1985). We are further required to indulge all reasonable inferences in favor of the non-movant, resolving all doubts in her favor. *Id.*

## ERISA Preemption

In her first, second, and third issues on appeal, Tierney urges that the trial court erred in finding that UNUM established as a matter of law that the plan in question was an employee welfare benefit plan under ERISA, that UNUM was estopped from arguing preemption based on the federal district court's holding that there was no ERISA plan,[2] and that UNUM did not establish as a matter of law that Tierney's state law claims were

[2] Tierney argues that the federal district court's denial of UNUM's preemption claim was binding on the state trial court under the doctrine of law of the case. She has carried that argument forward in this appeal. The law is to the contrary, however, and thus Tierney's second issue on appeal is without merit. *Soley v. First National Bank of Commerce,* 923 F.2d 406, 410 (5th Cir. 1991); *Sanchez v. Johnson & Johnson Medical Inc.,* 860 S.W.2d 503, 512 n.3 (Tex. App. – El Paso 1993), *rev'd in part on other grounds,* 924 S.W.2d 925 (Tex. 1996).

preempted. We sustain Tierney's first and third issues for the following reasons.

In examining a particular arrangement to determine whether it qualifies as an employee welfare benefit plan under ERISA, we inquire whether: (1) the plan exists within the meaning of ERISA; (2) the plan falls outside the safe-harbor exception established by the Department of Labor; and (3) the plan was established or maintained by the employer for the benefit of its employees. *Meredith v. Time Ins. Co.*, 980 F.2d 352, 355 (5th Cir. 1993). If the record demonstrates these three elements, ERISA preempts all Tierney's state law claims. UNUM's first motion for summary judgment asserted all three grounds for finding ERISA preemption. The trial court ruled in UNUM's favor as to each element. Viewing the record through the prism of summary judgment review, however, we find fact questions exist as to the first prong of the test, and do not reach the remaining two.

ERISA defines an "employee welfare benefit plan" as:

> [A]ny plan, fund, or program . . . established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise . . . medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment. . . .

29 U.S.C. § 1002(1) (1999). The Plan presented in this case involves disability insurance. To determine whether it

constitutes an employee welfare benefit plan under ERISA, we examine: (1) whether an employer established or maintained the plan and (2) whether the employer intended to provide certain benefits to its employees. *MDPhysicians & Associates, Inc. v. State Board of Insurance,* 957 F.2d 178, 183 (5th Cir.), *cert. denied,* 506 U.S. 861, 113 S.Ct. 179, 121 L.Ed.2d 125 (1992); *Hansen v. Continental Ins. Co.,* 940 F.2d 971, 978 (5th Cir. 1991). Whether a particular set of insurance arrangements constitutes an employee welfare benefit plan is a question of fact. *McNeil v. Time Ins. Co.,* 205 F.3d 179, 189 (5th Cir. 2000); *Zavora v. Paul Revere Life Ins. Co.,* 145 F.3d 1118, 1120 (9th Cir. 1998); *Grainger v. Western Casualty Life Ins. Co.,* 930 S.W.2d 609, 615 (Tex. App. – Houston [1st Dist.] 1996, writ denied).

The burden of establishing the existence of an ERISA plan was on UNUM. *Zavora,* 145 F.3d at 1120. Moreover, UNUM must overcome a presumption against preemption. *Great Dane Trailers v. Estate of Wells,* 52 S.W.3d 737, 743 (Tex. 2001).

In both the trial court and this Court, Tierney argued that SIS's disability insurance consisted of two separate plans – one for employees and one for owners – and therefore her coverage under the owner plan did not fall under ERISA. The Fifth Circuit has held that a plan in which the only participants are non-employees, such as owners or partners, does not constitute an ERISA benefit plan. *McNeil,* 205 F.3d at 190; *Meredith,* 980 F.2d at 357-58; *see Parker v. Parker,* 897 S.W.2d 918, 925 (Tex. App. – Fort Worth 1995, writ denied). In contrast, where a plan covers both employees and owners the plan is subject to ERISA and its complete preemption doctrine. *Vega v. National Life Ins. Servs., Inc.,* 188 F.3d 287, 294 (5th Cir.

1999); *see Taylor v. Carter,* 948 F. Supp. 1290, 1298 (W.D. Tex. 1996) (minority shareholder's role in administering plan constitutes "employer" status under ERISA). We must thus determine whether a fact question exists as to whether UNUM's policy created two truly independent plans.

The summary judgment evidence in this case indicates a single policy was issued by UNUM to SIS to provide long-term disability insurance coverage to SIS's employees and owners. The policy has a single effective date, single plan number, and single plan administrator. Nevertheless, having carefully examined the policy and the law, we must conclude that there is a genuine issue of material fact as to whether UNUM's disability plan constitutes a single plan or two distinct plans, one for employees and one for owners. We reach this conclusion for the following reasons.

Plaintiff Tierney testified that the agent who sold the UNUM policy told her the policy provided different coverages for owners and employees. The Plan clearly contemplates two classes of insured persons, "owners" and "employees." It requires owners to pay for their own coverage, while the company pays all premiums for employees. There are numerous differences in the coverage afforded the two classes: the beginning date for coverage is defined differently; disability is defined differently; benefits are determined differently. "Monthly earnings" are determined differently for owners and employees. The amount UNUM pays if the insured is working differs between the two classes; there are distinctions between how maximum capacity is determined. The effect of disability earnings on benefits is different as well. Payments to the two classes under the "disability plus" rider differ.

The policy provides UNUM is entitled to cancel coverage if less than 75 percent of owners or less than 100 percent of employees participate in the Plan. This distinction is significant, as coverage could be cancelled at UNUM's option if even one employee refused to participate, but would continue without the participation of a quarter of the owner class. Further, the policy language itself invites the conclusion that it contains multiple plans. It refers to initial premiums for "each plan." In defining terms, the policy states that "plan means a line of coverage under the policy." It refers to "limitations, exclusions and requirements that apply within a plan," and provides that UNUM may cancel or modify a plan if eligibility requirements are not met. The policy heads one section "Who can cancel this policy or a plan under this policy?".

Applying the presumptions favoring Tierney as nonmovant in the summary judgment context, and bearing in mind the presumption against preemption as well as UNUM's ultimate burden to establish that an ERISA benefit preempts Tierney's state law claims, we conclude that fact questions are presented as to whether UNUM wrote a policy containing two independent plans. If there are two plans, the one covering Tierney applied to owners only and is not subject to ERISA preemption. We therefore sustain Tierney's Issues One and Three. We need not reach the remainder of her issues on appeal.

## Conclusion

We reverse the trial court's grant of summary judgment and remand for further proceedings consistent with this opinion.

/s/ Susan Larsen
SUSAN LARSEN, Justice

January 30, 2003

Before Panel No. 4
Barajas, C.J., Larsen, and McClure, JJ.

[LOGO]

COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

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| JANCYE H. TIERNEY,<br>Appellant,<br>v.<br>UNUM LIFE INSURANCE COMPANY OF AMERICA and UNUM PROVIDENT CORPORATION,<br>Appellees. | §<br>§<br>§<br>§<br>§<br>§<br>§<br>§<br>§<br>§ | No. 08-02-00269-CV<br>Appeal from the<br>14th District Court of<br>Dallas County, Texas<br>(TC# 00-04604) |

**JUDGMENT**

The Court has considered this cause on the record and concludes there was error in the summary judgment. We therefore reverse the judgment of the court below and remand the cause for further proceedings consistent with this opinion. We further order that appellant recover from appellees all costs of this appeal, for which let execution issue. This decision shall be certified below for observance.

IT IS SO ORDERED THIS 30TH DAY OF JANUARY, 2003.

/s/ Susan Larsen
SUSAN LARSEN, Justice.

Before Panel No. 4
Barajas, C.J., Larsen, and McClure, JJ.

**CAUSE NO. 00-04604-A**

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| **JANCYE H. TIERNEY,** | § | **IN THE DISTRICT** |
| | § | **COURT** |
| **v.** | § | |
| **UNUM LIFE INSURANCE** | § | **OF DALLAS COUNTY,** |
| **COMPANY OF AMERICA** | § | **TEXAS** |
| **ET AL.** | § | |
| | § | **14TH JUDICIAL** |
| | § | **DISTRICT** |

**ORDER GRANTING PLAINTIFF'S MOTION TO DETERMINE ENTITLEMENT TO ATTORNEY'S FEES AND COSTS**

The Court, having considered the Plaintiff's Motion to Determine Entitlement to Attorney's Fees and Costs, and having heard argument of counsel, finds that the motion should be granted.

IT IS THEREFORE ORDERED that Plaintiff's Motion to Determine Entitlement to Attorney's Fees and Costs is granted and Defendants shall not recover an award of attorneys' fees and costs in this matter.

All parties shall bear their respective costs.

This Order disposes of all remaining claims and parties and is final.

SIGNED this 4 day of June, 2002.

/s/ Mary Murphy
Judge Presiding

**CAUSE NO. 00-04604-A**

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| **JANCYE H. TIERNEY,** | § | **IN THE DISTRICT** |
| | § | **COURT OF** |
| **vs.** | § | |
| **UNUM LIFE INSURANCE** | § | **DALLAS COUNTY,** |
| **COMPANY OF AMERICA** | § | **TEXAS** |
| | § | |
| **ET AL.** | § | **14TH JUDICIAL** |
| | § | **DISTRICT** |

**ORDER GRANTING THE UNUM DEFENDANTS' SECOND MOTION FOR SUMMARY JUDGMENT**

THIS MATTER is before the Court on the Second Motion for Summary Judgment of Defendants Unum Life Insurance Company of America ("Unum Life") and UNUM Provident Corporation (the "Unum Defendants") pursuant to Tex R. Civ. P. 166a, in which the Unum Defendants move for summary judgment on the issue of whether Unum Life abused its discretion in denying Plaintiff's claim for disability benefits. The Unum Defendants claim that the question of abuse of discretion is a question for the Court to determine based upon the evidence and record available to the plan administrator at the time of decision and that summary judgment is appropriate because (1) at the time Unum Life stopped paying benefits to Plaintiff, she was not disabled as defined by the Plan, and (2) Plaintiff's disability, if any, was primarily based on her self-reported symptoms and therefore subject to the 12-month limitation in the Plan. Plaintiff has filed a response in opposition to the motion asserting that the Unum Defendants have failed to conclusively establish compliance with ERISA and that she is entitled to have the jury determine whether the plan administrator's act in denying benefits was arbitrary and capricious. Plaintiff has offered evidence outside the administrative record in support of her opposition. Plaintiff also has filed her Cross Motion for

Summary Judgment requesting summary judgment that the plan administrator abused its discretion as a matter of law.

The Court finds that review of the ERISA plan administrator's decision may not be made de novo and is limited to the information available to the administrator prior to the lawsuit. *Vega v. National Life Insurance Services, Inc.*, 188 F.3d 287, 300 (5th Cir. 1999). The Court must determine whether the administrator abused its discretion and where, as here, the administrator has a conflict of interest, the Court may give less deference to the administrator's decision. *Vega*, *supra*, at 299. The court in *Vega* also rejected any duty by the administrator to conduct a good faith, reasonable investigation. *Vega*, *supra*, at 302.

The Court finds that, even considering the evidence offered by Plaintiff and to which the Unum Defendants have objected, and giving little or no deference to the administrator's decision, the administrator's decision was based upon more than unsupported suspicions, that some concrete evidence exists in the record supporting denial of the claim, and accordingly the Court cannot find an abuse of discretion under the standard stated in *Vega*.

IT IS THEREFORE ORDERED that the Unum Defendants' Second Motion for Summary Judgment is granted.

This order does not dispose of all parties and claims and, accordingly, is not final.

SIGNED this 18 day of April, 2002.

/s/ Mary Murphy
Judge Presiding

CAUSE NO. 00-04604-A

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| JANCYE H. TIERNEY | § | IN THE DISTRICT COURT OF |
| V. | § | |
| | § | DALLAS COUNTY, TEXAS |
| UNUM LIFE INSURANCE COMPANY OF AMERICA, ET AL. | § | |
| | § | 14TH JUDICIAL DISTRICT |

**ORDER GRANTING IN PART AND DENYING IN PART UNUM DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

THIS MATTER is before the Court on the Motion for Summary Judgment of Defendants Unum Life Insurance Company of America ("Unum Life") and UNUM Provident Corporation ("Defendants') pursuant to Tex. R. Civ. P. 166a, in which Defendants claim that (1) Plaintiff's claims for long term disability benefits are preempted completely by the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001, et seq. ("ERISA") and (2) Unum Life's denial of benefits was not an abuse of discretion as a matter of law.

**Legal Elements Related to ERISA Claims.**

In analyzing the applicability of ERISA, the court must decide whether (1) a plan exists, (2) the plan falls outside the safe harbor provisions established by the Department of Labor, and (3) the plan was established or maintained by an employer intending to benefit employees. *Meredith v. Time Ins. Co.*, 980 F.2d 352, 355 (5th Cir. 1993).

In determining whether a plan exists under the first *Meredith* factor, the court must determine whether a

reasonable person could ascertain the intended benefits, beneficiaries, sources of financing, and procedures for receiving benefits. *McDonald v. Provident Indemnity Life Ins. Co.*, 60 F.3d 234, 236 (5th Cir. 1995). If any part of the inquiry is answered in the negative, the policy is not a plan governed by ERISA. *Id.* 980 F.2d at 355.

With respect to the second factor of *Meredith*, it is the Plaintiff's burden to prove each of the following four elements of the Department of Labor safe harbor provisions: (1) the company did not pay any of the premiums for coverage, (2) participation by the employees was voluntary, (3) the company's role was limited to collecting and remitting premiums, and (4) the company received no profit from the plan. If Plaintiff cannot establish any of these four elements, the plan falls outside the safe harbor provisions. *McDonald*, 980 F.2d at 355.

**Preemption of State Law Claims.**

If Plaintiff's state law claims relate to an ERISA plan, they are subject to complete preemption. The preemption clause, 29 U.S.C. § 1144(a), states that ERISA provisions "shall supersede . . . State laws" to the extent those laws "relate to any employee benefit plan." The language of the ERISA preemption is deliberately expansive and has been construed broadly by federal courts. *Hubbard v. Blue Cross & Blue Shield*, 42 F.3d 942, 945 (5th Cir. 1995); *Corcoran v. United Healthcare, Inc.*, 965 F.2d 1321, 1328-29 (5th Cir. 1992). The saving clause, 29 U.S.C. § 1144(b)(2)(A), exempts from preemption "any law of any State which regulates insurance."

The key words, "regulates insurance," require interpretation in context. *UNUM Life Ins. Co. v. Ward*, 526 U.S. 358, 363 (1999) (hereinafter "*UNUM v. Ward*").

**Plaintiff's Responses.**

Plaintiff contends that no qualifying plan exists because (1) two separate plans exist, and (2) the safe harbor provision applies because Plaintiff paid her own premiums and the plan was voluntary. Plaintiff also argues by way of defense that her state law claims under arts. 21.21 and 21.55 of the Texas Insurance code (unfair settlement practices and failure to timely pay a claim) are not preempted, relying on the 1999 Supreme Court case of *UNUM v. Ward*, *supra*. Procedurally, Plaintiff also argues that Defendants are precluded from raising ERISA because of (1) the federal court's prior ruling on the removal petition, and (2) Defendants' failure to mention the ERISA defense in their initial response to Plaintiff's request for disclosure and their failure to assert ERISA initially as a defense in their answer. Plaintiff also argues that summary judgment is improper because Plaintiff is entitled to a jury on all fact questions related to the ERISA claims, including whether a plan exists.

**Applicability of ERISA.**

The parties do not dispute the facts – their difference lies in the interpretation of the policy and facts related to that policy. The undisputed facts are that (1) one policy exists, but the policy refers to different "plans," (2) "plan" is defined as a line of coverage under the policy, (3) the only line of coverage, regardless of

employee denomination as owner, manager, or employee, is "long term disability," (4) Plaintiff was one of three owner-employees under the policy, (5) the policy expressly provides that owners pay for their own coverage, yet the company paid Plaintiff's premiums, noting those as income on her W-2, (6) owner-employees could elect to participate, but if fewer than 75% of the owner-employees did not participate, the plan as to their coverage terminated, (7) one-owner employees are participants, (8) the company did more than remit premiums in administering the policy, and (9) the policy sets forth information from which benefits, beneficiaries, sources of financing and procedures for receiving benefits may be determined. The plan was to benefit the employees.

The Court finds that the policy in question qualifies as a plan under ERISA, that Defendants have negated at least one or more of the elements which might qualify Plaintiff for the safe harbor provision, and the plan was established for the benefit of employees. Accordingly, Defendants are entitled to summary judgment as to preemption under ERISA. With respect to Plaintiff's argument that a fact question exists for the jury, no factual dispute exists in the summary judgment record as to the essential facts and whether a plan exists under these facts is a matter of law. The Court further finds that Defendants are not precluded from raising their ERISA claims as a result of the federal court's prior ruling on the petition for removal or as a result of their initial response to Plaintiff's request for disclosure of their original answer.

**Preemption of Insurance Code Claims.**

Under *Cathey v. Metropolitan Life Ins. Co.*, 805 S.W.2d 387 (Tex. 1991), *cert. denied*, 501 U.S. 1232 (1991), the Texas Supreme Court rejected the argument that state laws which provided different or additional remedies to ERISA are not preempted. That case specifically involved Insurance Code art. 21.21 and art. 3.62, the predecessor to art. 21.55. Plaintiff argues that *Cathey* preceded *UNUM v. Ward*, that *UNUM v. Ward* effectively overrules *Cathey*, and that her Insurance Code claims are preserved and not preempted under *UNUM v. Ward*. The case of *UNUM v. Ward* involved California's notice-prejudice rule which precludes a company from denying a claim because it is untimely unless the company can show prejudice resulting from the untimely claim (not at issue in this case or under the Texas statute).

An argument similar to Plaintiff's was rejected by the Northern District of Texas in *Nations Personnel of Texas, Inc. v. American Medical Security*, 2000 U.S. Dist. LEXIS 4070 (N.D. Tex. March 31, 2000). There, the court restated that the Supreme Court in *UNUM v. Ward* did not create any new law for interpreting the words "regulating insurance" under the saving clause, and that the court's prior holding that Insurance Code art. 21.21 is preempted by ERISA has not changed. A plain reading of *UNUM v. Ward* supports the conclusion that the Supreme Court did not change or overrule existing law, and the Court in fact emphasized that its own precedent provides the framework for resolving whether a state law "regulates insurance." That framework is the same precedent relied upon by the Texas Supreme Court, and courts in the Fifth Circuit and the Northern District of Texas.

Based upon the record and applicable law before this Court, it does not appear that *UNUM v. Ward* was meant to change nor has it changed the reasoning of courts in this circuit holding that Insurance Code art. 21.21 does not "regulate insurance" so as to meet the saving clause of 29 U.S.C. § 1144(b)(2)(A). Accordingly, Defendants' motion for summary judgment as to ERISA's preemption of Plaintiff's state law claims should be granted.

**Whether Plan Administrator Abused Her Discretion**

Under *Vega v. National Life Ins. Serv., Inc.*, 188 F.3d 287 (5th Cir. 1999), the trial court is precluded from receiving evidence to determine whether the plan administrator abused her discretion in denying benefits, even where the administrator is conflicted in making her decision. The court is charged with assessing the factual questions, constrained to the evidence available to the plan administrator. Based upon the incomplete summary judgment record as to the information available to the plan administrator at the time of her decision, summary judgment should be denied on such issue.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Defendants' Motion for Summary Judgment that Plaintiff's claims are preempted under ERISA is granted and all claims asserted in Plaintiff's Second Amended Original Petition are preempted by ERISA.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Defendants' Motion for Summary Judgment that the plan administrator did not abuse her discretion is denied for the reasons set forth herein.

SIGNED this 4 day of February, 2002.

/s/ Mary Murphy
Judge Presiding

[SEAL] **THE SUPREME COURT OF TEXAS**
**Post Office box 12248**
**Austin, Texas 78711**

**(512) 463-1312**

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December 12, 2003

Mr. Doug K. Butler
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Mr. John M. Weaver
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RE: Case Number 03-0362
Court of Appeals Number: 08-02-00269-CV
Trial Court Number: 00-04604-A

Style: UNUM LIFE INSURANCE COMPANY OF AMERICA AND UNUM PROVIDENT CORPORATION
v.
JANCYE H. TIERNEY

Dear Counsel:

Today, the Supreme Court of Texas denied the petition for review in the above styled case.

Sincerely,

/s/ Andrew Weber
Andrew Weber, Clerk

by Nancy J. Vega,
Chief Deputy Clerk

cc: Ms. Denise Pacheco
Mr. Jim Hamlin

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29 U.S.C. § 1002. Definitions

For purposes of this title:

(1) The terms "employee welfare benefit plan" and "welfare plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 302(c) of the Labor Management Relations Act, 1947 [29 USCS § 186[(c)] (other than pensions on retirement or death, and insurance to provide such pensions).

(2) (A) Except as provided in subparagraph (B), the terms "employee pension benefit plan" and "pension plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program –

(i) provided retirement income to employees, or

(ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond, regardless of the method of calculating the contributions made to the plan, the method of calculating

the benefits under the plan or the method of distributing benefits from the plan.

(3) The term "employee benefit plan" or "plan" means an employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan.

. . .

(6) The term "employee" means any individual employed by an employer.

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29 U.S.C. § 1132. Civil enforcement

(a) Persons empowered to bring a civil action. A civil action may be brought –

(1) by a participant or beneficiary –

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

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29 U.S.C. § 1144. Other laws

(a) Supersedure; effective date. Except as provided in subsection (b) of this section, the provisions of this title and title IV shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 4(a) [29 USCS § 1003(a)]

and not exempt under section 4(b) [29 USCS § 1003(b)]. This section shall take effect on January 1, 1975.

29 C.F.R. § 2510.3-3 Employee benefit plan.

(a) General. This section clarifies the definition in section 3(3) of the term "employee benefit plan" for purposes of title I of the Act and this chapter. It states a general principle which can be applied to a large class of plans to determine whether they constitute employee benefit plans within the meaning of section 3(3) of the Act. Under section 4(a) of the Act, only employee benefit plans within the meaning of section 3(3) are subject to title I.

(b) Plans without employees. For purposes of title I of the Act and this chapter, the term "employee benefit plan" shall not include any plan, fund or program, other than an apprenticeship or other training program, under which no employees are participants covered under the plan, as defined in paragraph (d) of this section. For example, a so-called "Keogh" or "H.R. 10" plan under which only partners or only a sole proprietor are participants covered under the plan will not be covered under title I. However, a Keogh plan under which one or more common law employees, in addition to the self-employed individuals, are participants covered under the plan, will be covered under title I. Similarly, partnership buyout agreements described in section 736 of the Internal Revenue Code of 1954 will not be subject to title I.

(c) Employees. For purposes of this section:

(1) An individual and his or her spouse shall not be deemed to be employees with respect to a trade or business, whether incorporated or unincorporated, which is wholly owned by the individual or by the individual and his or her spouse, and

(2) A partner in a partnership and his or her spouse shall not be deemed to be employees with respect to the partnership.

Department of Labor.

Pension & Welfare Benefit Programs.

P/OPINION 76-67

*1976 ERISA LEXIS 58*

May 21, 1976

**OPINION**:

This is in reply to your letter dated January 9, 1976, in which you ask us to confirm your interpretation that if the only participants in a pension or profit sharing plan are shareholders or spouses of shareholders, qualified retirement plans need not comply with any of the reporting requirements of the Employee Retirement Income Security Act of 1974 (ERISA).

For purposes of Title I of the ERISA, the term "employee benefit plan" does not include any plan, fund, or program, other than apprenticeship or other training program, under which no employee participants are covered under the plan (section 2510.3-3(b) of the enclosed regulation). According to section 2510.3-3(c)(1), an individual and his or her spouse are not employees with respect to an incorporated business if the business is wholly owned by the individual or by individual and his or her spouse. Thus, your interpretation is correct only where the stock of the corporation is wholly owned by one shareholder and his or her spouse and the shareholder or the shareholder and his or her spouse are the only participants in the plan.